

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACI BETH JACKSON,

Defendant-Appellant.

UNPUBLISHED

June 15, 2006

No. 260313

Oakland Circuit Court

LC No. 2004-196540-FC

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted murder by poisoning, MCL 750.91, for placing a D-Con product used to kill mice in her husband's coffee. She was sentenced to 9 to 25 years' imprisonment. She appeals as of right. We affirm.

Defendant argues on appeal that the district court erred in binding her over for trial at the preliminary examination. Because defendant has failed to cite any factual support for this argument, as required by MCR 7.212(C)(7), this issue is not properly before this Court; an appellant may not leave it to this Court to search for a factual basis to sustain or reject a position, *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990), or give cursory treatment to an issue with little or no citation to authority, *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any case, "[a]n evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." *People v Hall*, 435 Mich 599, 601; 460 NW2d 520 (1990). For the reasons discussed below, defendant was fairly convicted at trial. Therefore, no appeal lies regarding the evidence at the preliminary examination. *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004); *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003).

Defendant next claims that the trial court violated the corpus delicti rule. This claim is similarly insufficiently briefed or supported with factual references. *Kelly, supra* at 640-641; *Norman, supra* at 260. We have nonetheless considered the issue and we find that it does not warrant appellate relief.

The corpus delicti rule was developed in homicide cases to guard against conviction of a criminal homicide where none was committed, *People v Williams*, 422 Mich 381, 388; 373 NW2d 567 (1985), but also applies to other crimes, *People v Cotton*, 191 Mich App 377, 389; 478 NW2d 681 (1991). In the context of crimes other than homicide, the purpose of the rule is

to prevent a defendant's confession from being used to convict him or her of a crime that never happened. *Id.* This procedural safeguard requires the prosecution to show "that the specific injury or loss has occurred and that some person's criminality was the source or cause of the injury" in order to admit a defendant's confession. *Id.* In general, direct or circumstantial evidence, independent of the defendant's confession, is required to establish the corpus delicti of an offense. *People v Konrad*, 449 Mich 263, 270; 536 NW2d 517 (1995); *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). Proof beyond a reasonable doubt is not necessary. *People v Modelski*, 164 Mich App 337, 341-342; 416 NW2d 708 (1987); *People v Wise*, 134 Mich App 82, 88; 351 NW2d 255 (1984). Particularly in cases where evidence of these elements is largely circumstantial, the order of proof may be discretionary. *People v Bigge*, 297 Mich 58, 67; 297 NW 70 (1941); *People v Lewis*, 31 Mich App 433, 436; 188 NW2d 107 (1971).

A critical distinction in the evidence a prosecutor may present to establish the required elements is that between statements which are "confessions" and those which are not. Statements made before the commission of a crime are not confessions, *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1982); nor are admissions of fact. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). A statement is an admission of fact rather than a confession if it "needs proof of other facts, which are not admitted by the accused, in order to show guilt"; "[a]lso an admission of one, but not of all, the essential elements of the crime is not a confession." *People v Porter*, 269 Mich 284, 290-291; 257 NW 705 (1934).

Defense counsel raised evidentiary issues based on the corpus delicti rule during the preliminary examination, in a pre-trial motion, and during trial. As to the pre-trial motion, the trial judge denied the motion to preclude admission of defendant's statements with respect to the attempted murder charge, and granted it in part and denied it in part with respect to the poisoning charges. As to the other objections, the trial judge found that sufficient other evidence of the wrong had been provided, and that the statements at issue were admissions of fact and not confessions. Defendant argues on appeal both that no independent evidence was presented and that all statements at issue were confessions.

In general, a trial court's evidentiary decisions are reviewed for an abuse of discretion, while a question of law affecting the admissibility of evidence is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We note that the poisoning charge under MCL 750.436(2)(c), poisoning a drink with D-Con causing physical injury, was dismissed before trial. At trial the poisoning charge under MCL 750.436(2)(a), poisoning a drink with D-Con, was presented to the jury as a lesser offense to the attempted murder charge under MCL 750.91. Defendant was convicted of attempted murder under MCL 750.91. Defendant argues on appeal that the trial court erred in its pre-trial ruling that some statements were admissible as to the attempted murder charge but not as to the poisoning charge. Defendant's argument is simply incorrect, given the different elements to be proved for the different charges.

The poisoning charge required proof that a person willfully mingled a poison or harmful substance with a drink, knowing or having reason to know that another person may ingest it to his or her injury. MCL 750.436(1)(a). Purposefully placing a harmful substance in a drink is a malum in se act. See *People v Holtschlag*, 471 Mich 1, 7, 22; 684 NW2d 730 (2004). Attempted murder required an intent to cause a death. See *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001). An attempt generally consists of an intent to do an act or bring about consequences that would be a crime and an act in furtherance of that intent going beyond

mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). Further, there must be a failure to consummate the crime. *People v Ng*, 156 Mich App 779, 785; 402 NW2d 500 (1986).

The traditional application of a corpus delicti rule is more difficult for an inchoate crime like an attempt, because, by definition, the crime does not include tangible injury or loss that can be isolated as the focus of the corpus delicti. *DeJesus v State*, 655 A2d 1180, 1203 (Del, 1995). Therefore, it is appropriate to require the prosecutor to introduce independent evidence of the criminal conduct forming the gravamen of the offense. *Id.* at 1203-1204.

We agree with the trial court that here the prosecutor met that burden. On appeal defendant has not identified which of her many statements are at issue in the claim of error, so we consider those objected to during the lower court proceedings. While we find that defendant's statement to Barnie Nowicki¹ that she put D-Con in her husband's coffee² may have been a confession rather than an admission of fact, we cannot find that the trial court abused its discretion in ruling otherwise. This is a close evidentiary question and we will not substitute our judgment for that of the trial court. We also find that defendant's statements to her friend Joann Fine regarding her various plans to kill her husband were not confessions. We further find that irrespective of the admission of Nowicki's statements, there was sufficient other evidence to establish the requisite corpus delicti.

In this case, the delicti, or essence of the wrong, was a person's purposeful act of placing poison in another person's drink. Cf. *State v Johnson*, 821 P2d 1150 (Utah, 1991) (under Utah's corpus delicti rule, the "wrong" to establish corpus delicti for attempted murder through the administration of oxalic acid was the fact of the administration of oxalic acid; the requisite criminal agency was established by the presence of the substance in capsules without the victim's knowledge). Proof of the corpus delicti for the attempted murder charge was interwoven with proof of defendant's guilt, but there was sufficient circumstantial evidence at trial, independent of defendant's statements, that she placed D-Con in the coffee, that evidence being, in essence, the same evidence that established the corpus delicti for the poisoning charge. Cf. *Commonwealth v Stokes*, 225 Pa Super 411; 311 A2d 714 (1973) (corpus delicti for pointing a firearm and attempt with intent to kill established from same act). Independent of defendant's statements that she placed D-Con in the coffee, there was evidence at trial that defendant purchased the D-Con product on March 3, 2004, even though her husband was unaware of any mice problems at the home, that defendant asked a friend for advice concerning whether D-Con

¹ Defendant apparently met Nowicki at a wedding, engaged in a very personal conversation with him at that point, and met him for lunch one or two weeks later, during which conversation defendant made the admissions at issue.

² Nowicki testified during the preliminary examination that after defendant discussed her wish to have her husband killed and tried to solicit Nowicki's help in finding someone to help her with her plan, defendant told him: "I already did something," and "I put d-CON in his coffee." When asked for more detail, Nowicki added, "[s]he told me she ground it up into a fine, fine powder, as fine as possible, and put it into his coffee for him to drink."

could be detected during an autopsy, that defendant gave her husband a mug of coffee to take to work on March 16, which was unusual, that defendant's husband found the coffee too sweet to drink, that the coffee mug later disappeared, and that the D-Con product found in the garage was missing 12.03 grams. Taken altogether, the circumstantial evidence provided a sufficient foundation for defendant's statements that she placed D-Con in her husband's coffee.

Next, defendant argues that her motion to disqualify the trial judge should have been granted. The trial judge had received and read a letter from one of defendant's fellow inmates prior to ruling on a bond reduction motion brought before trial. We first note that whatever impact, if any, the letter had on the ruling in the bond reduction hearing was limited to the bond issue and therefore is not redressable now that defendant has been convicted. We next note that defendant was tried by a jury, and the judge therefore was not the trier of fact; in such a circumstance, "[t]he fact that the judge may believe the accused guilty of the crime charged is not sufficient to show prejudice." *Kolowich v Ferguson*, 264 Mich 668, 672; 250 NW 875 (1933). Defendant preserved this issue for appeal by seeking de novo review by the chief judge. MCR 2.003(C)(3)(a). While MCR 2.003(B)(1) requires a showing of actual bias or prejudice, "[t]he test [for disqualification] is not just whether or not actual bias exists but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the affected party." *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995), mod 451 Mich 457 (1996). On the facts of this case, we find that defendant has not established any basis for reversal of the chief judge's decision to deny her motion for disqualification. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). We are satisfied from our review of the record that the chief judge correctly rejected defendant's argument that the trial judge's receipt and reading of an anonymous letter affected his partiality. See *Olson v Olson*, 256 Mich App 619, 642; 671 NW2d 64 (2003); *Ireland*, *supra*.

Finally, defendant claims that the prosecutor's rebuttal argument regarding her failure to testify at trial warrants reversal. Generally, we review a claim of prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). As a threshold matter, "[a] prosecutor is not permitted to comment on a defendant's failure to take the stand," because such comment implicates the Fifth Amendment privilege against self-incrimination. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). However, although prosecutors are advised to tread very lightly when approaching this line, "[t]here is no reversible error when the prosecutor's remarks, even if otherwise improper, are made primarily in response to matters previously discussed by defense counsel." *People v White*, 81 Mich App 226, 229; 265 N.W.2d 100 (1978) (In closing arguments, defense counsel commented on defendant's failure to testify; the prosecutor's rebuttal was not reversible error.) (citations omitted). In this case the prosecutor's remarks were responsive to defense counsel's own improper attempt in closing argument to explain to the jury why defendant did not testify. In closing arguments, defense counsel stated that he "made the choice" for defendant not to testify; the prosecutor merely stated in rebuttal that the choice was defendant's to make.

Under the doctrine of invited response, we must examine the proportionality of the prosecutor's response, as well as its invitation, in determining if error occurred that requires reversal. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). Here, the prosecutor's response that defendant made a choice not to testify was brief and accurate, given the record

made outside the presence of the jury regarding defendant's waiver of her right to testify. Under the circumstances, it cannot be said that the prosecutor's rebuttal remark affected the fairness of defendant's trial. Any prejudice was cured by the trial court's later instruction that defendant's failure to testify should not affect the verdict in any way. Juries are presumed to follow their instructions, and instructions are presumed to cure most errors. *Abraham, supra* at 279. The prosecutor's statement, in its context, does not rise to the level of reversible error.

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello